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No. 06-1072

Supreme Court, U.S.
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In The
Supreme Court of the United States

GEORGE MIYASHIRO,

Petitioner,

vs.

Honorable GEORGE M. MASUOKA, Judge in the trial court, and the SUPREME COURT OF THE STATE OF HAWAII,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

BRIEF OF RESPONDENT STANLEY H. ROEHRIG IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PETER VAN NAME ESSER
Counsel of Record
Suite 400,
Seven Waterfront Plaza
500 Ala Moana Boulevard
Honolulu, Hawaii 96813
(808) 538-3636

KEITH K. HIRAOKA, ESQ.
ROECA, LOUIE & HIRAOKA, LLP
841 Bishop Street, Suite 900
Honolulu, Hawaii 96813
(808) 538-7500

BRIAN J. DE LIMA, ESQ.
CRUDELE & DE LIMA
101 Aupuni Street, Suite 133
Hilo, Hawaii 96720
(808) 969-7707

Attorneys for Respondent Stanley H. Roehrig

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

A. IN VIEW OF THE TRIAL COURT'S DISMISSAL OF THE UNDERLYING MALPRACTICE ACTION BECAUSE OF PETITIONER'S EMBEZZLEMENT AND BREACH OF FIDUCIARY DUTY, SHOULD THIS COURT LIKEWISE DECLINE TO ASSIST PETITIONER, WHO WOULD USE THE JUDICIAL PROCESS TO BENEFIT FROM HIS OWN FRAUDULENT CONDUCT?

B. DOES PETITIONER HAVE A CONSTITUTIONAL RIGHT TO CHOOSE OUT-OF-STATE COUNSEL AS LEAD TRIAL COUNSEL, DESPITE COUNSEL'S DISQUALIFICATION BY A CALIFORNIA COURT, MULTIPLE *PRO HAC VICE* APPEARANCES, UNAUTHORIZED PRACTICE OF LAW, DISCOVERY MISCONDUCT, AND STIPULATION BY PETITIONER THAT HIS *PRO HAC VICE* LAWYER BE LIMITED TO A SUPPORTING ROLE?

C. IS THE HAWAII SUPREME COURT'S ORDER DENYING MANDAMUS A FINAL JUDGMENT FOR PURPOSES OF 28 U.S.C. § 1257(A), WHEN JUDGMENT HAS BEEN ENTERED IN THE UNDERLYING MALPRACTICE ACTION, PETITIONER HAS APPEALED, AND THE SAME QUESTION REGARDING *PRO HAC VICE* COUNSEL HAS BEEN LISTED IN HIS POINTS ON APPEAL?

LIST OF PARTIES TO THE PROCEEDING

Petitioner GEORGE MIYASHIRO ("Miyashiro") is the plaintiff-appellant in *Miyashiro v. Roehrig, Roehrig, Wilson and Hara*, Civil No. 04-1-0211, a legal malpractice action filed on July 19, 2004, against defendant-appellee and respondent STANLEY H. ROEHRIG ("Roehrig") in Hawaii's Third Circuit Court, and currently on appeal in the Hawaii Intermediate Court of Appeals, No. 28395. This State court appeal by Miyashiro follows the entry of a judgment on all claims in favor of Roehrig by Respondent GEORGE M. MASUOKA, Hawaii Circuit Court Judge, after the court granted four motions for summary judgment. Miyashiro filed a statement of points on appeal in that proceeding which includes the *pro hac vice* ruling challenged herein. Miyashiro has also named Respondent HAWAII SUPREME COURT, based on its November 1, 2006, order denying Miyashiro's petition for writ of mandamus asking that court to vacate Judge Masuoka's *pro hac vice* order in *Miyashiro*.

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BRIEF OF RESPONDENT STANLEY H. ROEHRIG IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is a Brief in Opposition filed by Respondent STANLEY H. ROEHRIG ("Roehrig") to a Petition for Writ of Certiorari filed by Petitioner GEORGE MIYASHIRO ("Miyashiro"), which challenges a November 1, 2006, order filed by Respondent HAWAII SUPREME COURT. *See* Petition, Appendix A. This State order denied Miyashiro's petition for writ of mandamus in *Miyashiro v. Masuoka*, S. C. No. 28193, which in turn, affirmed an order by Respondent GEORGE H. MASUOKA, Hawaii Circuit Court Judge ("Judge Masuoka"), denying a motion by Miyashiro to have California lawyer Eugene J. Albertini appear *pro hac vice* as his lead trial counsel in *Miyashiro v. Roehrig*, Civil No. 04-1-0211, a legal malpractice action now on appeal in the Hawaii Intermediate Court of Appeals.

Roehrig contends this Court: 1) should decline to render aid to one who would use the judicial process to benefit from his own fraudulent conduct, 2) lacks jurisdiction under 28 U.S.C. § 1257(a) because the *pro hac vice* ruling challenged in this Petition has been appealed and the Hawaii Supreme Court has not issued a final ruling, and 3) has never identified a federal constitutional right to choose out-of-state lead trial counsel in a civil case.

STATEMENT OF THE CASE

A. Introduction

This Petition for Writ of Certiorari is the latest in a series of legal maneuvers by Petitioner Miyashiro, the former president and CEO of a Hawaii transportation and tour company called Jack's Tours, to recover additional financial benefits after being expelled from that company due to embezzlement and breach of fiduciary duty, by suing his former attorneys. This Petition makes no mention of Miyashiro's acknowledged fraudulent and illegal conduct, however, or the dismissal of his malpractice claims by Respondent Judge Masuoka based "on Plaintiff's admitted embezzlement and breach of fiduciary duty." *See* Appendix A at 2. This Court, like the Hawaii Judiciary, should likewise decline to "aid a tortfeasor who invokes the court's jurisdiction to relieve him of the consequences of fraud." *Bondi v. Thornton International*, 421 F.Supp.2d 703, 713 (S.D.N.Y. 2006).

Moreover, while Miyashiro repeats spurious allegations about "multiple violations of the Rules of Professional Conduct in Hawaii" by Respondent Roehrig, he makes no mention of Judge Masuoka's additional and alternative ruling granting summary judgment on all claims after finding, as a matter of law, that Miyashiro offered no evidence whatsoever that his former lawyer violated any of the *Hawai'i Rules of Professional Conduct*. *See* Appendix B. He likewise fails to inform this Court that he filed identical charges with the Hawaii Supreme Court's Office of Disciplinary Counsel, and that after a thorough review, that watchdog agency also found no substance whatsoever to Miyashiro's claims.

Moreover, Miyashiro claims Eugene J. Albertini "is an experienced attorney of good standing," and that "there [was] no mention of any misconduct, conflicts of interest, unethical behavior or other problems that [made] it inadvisable" to grant Albertini *pro hac vice* status. Petition at 14. In fact, Roehrig presented substantial evidence to trial judges Ronald Ibarra and George Masuoka regarding Albertini's unauthorized practice of law in Hawaii, his substantial discovery misconduct after his appointment, and his undisclosed disqualification as counsel by the California Court of Appeals because of serious violations of that State's Code of Responsibility. *See Chronometrics v. Sysgen, Schaefer and Fatt*, 110 Cal.App.3d 597, 168 Cal.Rptr. 196 (1980). *See* Appendix C.

Finally, while Miyashiro contends this Court has jurisdiction under 28 U.S.C. § 1257(a) to review the Hawaii Supreme Court's order denying mandamus challenging the trial court's *pro hac vice* rulings, he fails to inform this Court that after that order was filed, Judge Masuoka granted summary judgment in the underlying legal malpractice case, judgment was entered for Roehrig on all claims, Miyashiro appealed. That appeal is still pending. He has listed this same *pro hac vice* ruling in his statement of points on appeal.

B. Background.

1. THE UNDERLYING CASES.

a. The *Jack's Tours* Litigation

On September 15, 1997, Miyashiro hired Roehrig and his former law partner, now Hawaii Third Circuit Judge Glenn S. Hara ("Judge Hara"), to defend him against a lawsuit filed by his brother Raymond Miyashiro ("Raymond"),

which claimed fraudulent and illegal conduct by Miyashiro in the operation of their family's Big Island transportation and tour company, Jack's Tours. Raymond claimed that Miyashiro, as the controlling stockholder and CEO, had embezzled company funds.

After Roehrig and Judge Hara were retained, Miyashiro told them he and Jack's Tours comptroller Donald Bowers were participating in an illegal scheme at local banks. This scheme involved millions of dollars and the forgery of Miyashiro's former wife's name on loan applications. Concerned, Roehrig researched the issue and determined that his client was likely engaged in an ongoing federal felony. Regardless, Roehrig and Judge Hara agreed to represent Miyashiro against Raymond on condition that he "go straight" and advise them of any questionable conduct in the future. Raymond's case was settled in 1998 when he sold his shares in Jack's Tours, without any public disclosure of bank fraud and embezzlement.

On January 2, 1999, after a dispute with his former wife and son Jeffrey Miyashiro ("Jeffrey"), Miyashiro surrendered Jack's Tours to them. When they entered the premises and spoke with comptroller Donald Bowers, he told them Miyashiro had been stealing money from the company for years. Jeffrey and his mother sued Miyashiro, asserting embezzlement and fraud, and asking that he be removed from control. On April 21, 1999, after a two-day evidentiary hearing describing Miyashiro's improper conduct, Third Circuit Court Judge Greg K. Nakamura removed him from control of Jack's Tours. Jeffrey testified as follows:

> [Comptroller] Bowers informed me that sometime back in 1990 or 1991, he was instructed by George to find ways to take as much money out

> of the company as possible for his benefit and that although Mr. Bowers had pleaded with George to do things legally, . . . George simply didn't care. . . . In that same conversation, Mr. Bowers also informed me of . . . George Miyashiro's disregard of the law in running the company[.]

4/21/99 Tr. at 166. Accountant Taryn Schuman also testified, submitting a lengthy report prepared by her and Jeffrey showing Miyashiro's embezzlement of over $1.3 million from Jack's Tours from 1994 to 1998. Id. at 122-146. After he was removed from control, Miyashiro quietly settled the dispute with his family and surrendered his stock to his former wife. Again, he avoided public exposure or criminal charges by settling with his family before the misconduct was aired.

b. The *Roehrig* Malpractice Case

On January 2, 2003, Hawaii lawyer David Gierlach filed the first of two complaints on behalf of Miyashiro against Roehrig and his law firm, Roehrig, Roehrig, Wilson and Hara, claiming malpractice because of their alleged collusion with other family members to remove him from control of Jack's Tours and deprive him of its lucrative benefits. That lawsuit was dismissed for lack of prosecution.

On July 19, 2004, Gierlach filed a second lawsuit for Miyashiro, again charging Roehrig and his firm with malpractice, but adding Judge Hara as an additional defendant. Roehrig and his firm commenced discovery, and soon learned that the scope of their former client's illegal conduct at Jack's Tours was more extensive than he disclosed during their representation. Unknown to his

lawyers, between 1994 and 1998 Miyashiro engaged in a widespread scheme involving fraud, falsification of company books, cash kickbacks, embezzlement of company funds, and a complex illegal bar code scam involving various vendors.

When Roehrig discovered the extent of Miyashiro's misconduct while CEO at Jack's Tours, he filed a motion for summary judgment alleging unclean hands, asserting the well-known principle that courts should not be used by fraudfeasors to benefit them from their illegal misconduct. "The basis of the Plaintiff's action in the present case," noted one court in a similar lawsuit, "is an attempt to reduce the economic consequences of his fraudulent conduct by recovering from his attorney." *Goldstein v. Lustig*, 507 N.E.2d 164, 170 (Ill.App. 1987). "The trial court did not err in dismissing the complaint with prejudice." Id. On September 11, 2006, Roehrig filed this and three other motions for summary judgment, two months before the scheduled trial date. *See* Appendix A. In addition to asserting unclean hands, Roehrig also sought summary judgment based on the *Hawai'i Rules of Professional Conduct*, conspiracy and corporate by-laws. In his December 21, 2006, oral ruling based on Miyashiro's acknowledged embezzlement and breach of fiduciary duties, Judge Masuoka declared:

> The court will grant Defendant's motion as to the embezzlement and breach of fiduciary duties. The court has read the reports of the experts, even the Plaintiff's expert, Mr. Ueno, who signed a report with Ms. Schuman indicating that there was embezzlement. Also, the other economic experts, Milks, Mr. Yokoyama and there was one other, I believe, also agree with them. Under these circumstances, the court finds that there

> are no questions of fact and that there was embezzlement.

12/21/06 Tr. at 4.

Again, the instant Petition for Writ of Certiorari conceals Miyashiro's acknowledged embezzlement and breach of fiduciary duties. Indeed, it ignores all four rulings for summary judgment and a final judgment entered in favor of Roehrig. *See* Appendix D. This Petition paints a false picture that trial is imminent and Miyashiro is deprived of out-of-state *pro hac vice* lead trial counsel of his choice. There is no trial pending, only an appeal.

In fact, Miyashiro has been represented by Hawaii counsel David Gierlach as lead trial counsel since 2003, and by *pro hac vice* assistant counsel Albertini since 2002. When Roehrig filed four motions for summary judgment on September 11, 2006, Albertini drafted the opposition memoranda, Gierlach argued for Miyashiro, and Judge Masuoka granted them in Roehrig's favor.

2. THE *PRO HAC VICE* MOTIONS

a. The First Motion.

On September 16, 2004, 18 months after the first malpractice lawsuit was filed, and two months after the second, Gierlach filed a motion on behalf of Miyashiro asking the Third Circuit Court to permit 74-year-old California attorney Eugene Albertini to assist him as *pro hac vice* counsel in *Miyashiro v. Roehrig*. He did not request Albertini's appointment as lead counsel, but rather sought the court's approval of his continued assistance of Miyashiro and Hawaii lawyer Gierlach, which had apparently been going on without court approval since 2002.

The motion was heard by Third Circuit Judge Ronald Ibarra, Administrative Judge of Hawaii's Third Circuit Court, which includes Judges Ibarra, Nakamura, and Hara. Judges Nakamura and Hara sit in Hilo, and Judge Ibarra sits in Kona, on the other side of the Big Island. Judge Hara could not hear this case for obvious reasons. Judge Nakamura recused himself without comment, presumably because his brother Hilo judge was a party in the case. After Judge Ibarra ruled on the first *pro hac vice* motion, he also recused himself, without comment, no doubt for the same reasons as Judge Nakamura. According to Miyashiro, the recusal of these judges "is testament to the pervasive contacts of Roehrig." Petition at 4. There is no evidence to support this specious claim, since Roehrig has appeared countless times before Judges Nakamura and Ibarra since their appointment to the Big Island bench.

On October 11, 2004, the parties argued the *pro hac vice* motion before Judge Ibarra. The court heard extensive argument from Gierlach and Albertini, who acknowledged that Miyashiro had consulted extensively with Albertini since 2002, both before and after Gierlach entered the case. 10/11/04 Tr. at 8-9, 28. Albertini filed an affidavit claiming he was "ready to go to trial," which caught Judge Ibarra by surprise because this was Albertini's first request for *pro hac vice* approval. Id. at 27. Further, Albertini acknowledged, when confronted by defense counsel, that he had served as *pro hac vice* counsel at least four other times in Hawaii, and still had no plans to take the Hawaii Bar. Id. at 15, 25. He also acknowledged appearing *pro hac vice* in three other states, including Alabama, Nevada and Florida. Id. at 22. Gierlach acknowledged that

he had never heard of another lawyer appearing more than twice as *pro hac vice* in Hawaii's courts. Id. at 32.

Judge Ibarra expressed concern about Albertini's extensive representation of Miyashiro before requesting or obtaining permission from the court, or even meeting Gierlach, and his frequent *pro hac vice* appearances in Hawaii:

> The impression that I had from reading these pleadings is that Mr. Albertini has practiced law in Hawaii before. And in this case Mr. Albertini has basically done work before associating or getting permission or before doing work under the supervision of local counsel, as a consultant, in essence, practicing law even before getting *pro hac vice* approval.

10/11/04 Tr. at 10. "It seems like he had done work coming into the state of Hawaii without retaining local counsel," the court observed, "it seems like [Miyashiro] met with Albertini before he had any other representation." Id. "The court would not be concerned if Mr. Albertini's first application was in this case." Id. at 8, 9, 35. "Is there any reason why he doesn't sit for the bar exam?" Id. at 14.

Although Albertini assured Judge Ibarra he had never been disciplined in California, when defense counsel searched court records he found a 1980 case disqualifying Albertini for breach of California's Code of Professional Conduct. Id. at 30, citing, *Chronometrics v. Sysgen, Schaefer and Fatt*, 110 Cal.App.3d 597, 168 Cal.Rptr. 196 (1980). Albertini had engaged in numerous *ex parte* communications with an opposing party without his lawyer's knowledge. Albertini denied to Judge Ibarra that he was sanctioned in *Chronometrics* or that he had acted in an

unprofessional manner. Id. at 36. "We're the ones that took it up on appeal," he said. Id. at 36. After the trial judge disqualified his firm because of Albertini's contacts with an opposing party, "I took it up on appeal and *I reversed him*." [emphasis added] Id. at 37. "That became big law cited many times in the state of California," said Albertini, "nothing about that case in any way do I feel any detriment coming in my direction." Id. "I'm proud of that case." Id.

Defense counsel disagreed. Id. at 39. "I urge the court to read it," he said, "because it does criticize his conduct." Id. The truth of the matter is Albertini never "reversed" the trial court. The California appellate court affirmed Albertini's personal disqualification because his conduct "violated Rule 7-1203 of the Rules of Professional Conduct." 168 Cal.Rptr. at 200. The court held:

> It is undisputed in the opposing declarations that Albertini did communicate with Fatt without the consent of his attorney of record in the litigation, the only matter controverted being whether the communication was "upon a subject of controversy." The trial court resolved this conflict against [Albertini].

168 Cal.Rptr. at 199. "We must take as true the fact that Albertini communicated with Fatt respecting a subject of controversy," the California court said, "and thus violated Rule 1-103 of the Rules of Professional Conduct." Id. "If the status or misconduct which is urged as a ground for disqualification will have a continuing effect on the judicial proceedings before the court, it is justified in refusing to permit the lawyer to participate in such proceedings." Id. at 202. "It was not an abuse of discretion to refuse to permit *the wrongfully obtained information* to be used by

Albertini directly in the proceedings before the court." Id. at 203 (emphasis added).

As such, the California trial judge's order disqualifying Albertini was not "reversed," and his disqualification because of rule violations in a decision that "became big law cited many times" was hardly a ruling of which Albertini should "be proud." Further, his false characterization of the *Chronometrics* case at the *pro hac vice* hearing clearly misled Judge Ibarra. 10/11/04 Tr. at 37. This California case, and the misrepresentations made to the court about its significance, were grounds alone to deny Albertini any *pro hac vice* role in Miyashiro's case.

Judge Ibarra also questioned Gierlach about the necessity of *pro hac vice* counsel when so many licensed lawyers were available in Hawaii to assist him. Id. at 7-8, 33-35. Gierlach claimed it was difficult to find local counsel because of Roehrig's reputation and political connections. Id. at 34. Miyashiro wrote letters to 12 Big Island lawyers, he said, and they did not respond. Id. at 8. Judge Ibarra noted that Hawaii has 5000 licensed lawyers. Id. at 34. Most, like Gierlach, have offices in Honolulu, and have never met or worked with Roehrig, who has lived and worked in Hilo since he passed the Hawaii bar exam in 1965. Id. Roehrig offered a list of 25 Hawaii lawyers that specialize in legal malpractice, three of which practice on the Big Island, and none of which were contacted by Miyashiro. Id. at 26.

Finally, while Miyashiro now complains that Albertini's role was improperly limited to associate status in his case, Gierlach told Judge Ibarra in October 2004 that he would gladly remain lead counsel, with Albertini "drafting pleadings that I can review and approve." Id. at 13-14. "If I

can have the assistance of Mr. Albertini," said Gierlach, "I [will] be present as lead counsel at all hearings." Id. at 14. Albertini also agreed to this limited status he presently enjoys in Miyashiro's case, and promised to serve in a supporting role. Id. at 28.

Judge Ibarra ruled as follows:

> [U]nder Rule 1.9 of the Hawaii Supreme Court, it gives the discretion of the presiding judge to allow the *pro hac vice*. In the [*Bank of Hawaii v. Kunimoto*, 91 Hawai'i 168, 45 P.3d 368 (2002)], there is no right or entitlement to apply for or be granted *pro hac vice* status before any state court. In this particular case the court is concerned, number one, that Mr. Albertini has been admitted *pro hac vice* status in Hawaii four other times[.] Secondly, Mr. Albertini can still be retained as consultant or paralegal, as Mr. Gierlach stated at the outset. In fact, Mr. Albertini has worked on this case with Mr. Gierlach. Third, Mr. Gierlach, as this court is familiar with, is very competent to handle trial in complex cases. Fourth, the court is not satisfied that there has been sufficient showing to show that of the total bar population, that Mr. Miyashiro would not be able to retain any other lawyer to assist Mr. Gierlach in the handling of the legal malpractice case. So the motion is denied.

10/11/04 Tr. at 39. Miyashiro's first motion for appointment of Albertini as *pro hac vice* counsel was denied "without prejudice." *See* Appendix E.

b. The Second Motion.

Albertini continued his work with Gierlach as a "paralegal." After Judge Ibarra's recusal in December 2004, Respondent Fifth Circuit Court Judge GEORGE M. MASUOKA was assigned to hear Miyashiro's case. On November 22, 2004, Miyashiro renewed his motion for appointment of Albertini as a *pro hac vice* assistant counsel with Gierlach in his case. Roehrig and his co-defendants filed similar objections to the motion, noting the number of qualified local lawyers available to take the case, Albertini's multiple *pro hac vice* appointments, his unauthorized practice of law working for Miyashiro without court approval, his disqualification for professional misconduct in the 1980 California appeal, and his misrepresentations to Judge Ibarra about the nature of that appeal.

On April 6, 2005, the parties appeared before Judge Masuoka to argue the second *pro hac vice* motion. During a recess the parties agreed that Albertini would be permitted to assist Gerlach as *pro hac vice* counsel, but only in non-court discovery matters and the drafting of pleadings. Although Miyashiro suggests otherwise in his Petition, the parties never agreed to Albertini's full *pro hac vice* lead trial counsel status:

> Mr. Albertini will be allowed to participate in non-court matters. At hearings Mr. Gierlach will do the appearances, and the issue of whether or not Mr. Albertini may participate in the trial is reserved.

4/6/05 Tr. at 3. Judge Masuoka agreed with the stipulation, but with the proviso that "anytime if the court feels Mr. Albertini is not conducting himself to the standards

that this court wants him to and in accordance with what the Court feels that the Hawaii Bar [and] the level of professionalism [require], this court will prohibit him from practicing at all." Id. at 13-14. "So if at any time he interrupts me or tries to speak out of turn or interrupts the proceeding, the court may take action immediately," the court told Gierlach, "you understand?" Id. at 14. Obviously Judge Masuoka's prior experience with Albertini – in addition to his review of Roehrig's opposition papers – led him to express this unusual warning to Gierlach about Albertini's future conduct in this case. Id. On September 1, 2005, Judge Masuoka filed an order permitting Albertini "to attend hearings and other court proceedings with David J. Gierlach, but Mr. Albertini is not allowed to argue or address the court[.]" *See* Appendix F at 3.

c. The Third Motion.

On August 28, 2006, only two months before trial, Miyashiro filed a third and final motion regarding Albertini's *pro hac vice* status, this time insisting that the court expand his role to lead counsel in this malpractice case. Roehrig, the only remaining defendant, reiterated his prior objections to Albertini's *pro hac vice* appearance, and questioned the need to change the limited *pro hac vice* arrangement agreed to by the parties in April 2005.

Moreover, during the 16 months between the April 2005 hearing commencing Albertini's limited *pro hac vice* status, and this third *pro hac vice* motion, Roehrig and his lawyers were able to observe his conduct during pre-trial discovery, and they did not like what they saw. First, Albertini utilized sealed documents from the Jack's Tours litigation to prepare his case, without telling opposing

counsel or obtaining the court's permission. Second, he made misstatements to the discovery master (a retired judge) about the scope of materials turned over to opposing counsel. Third, he caused substantial delays in discovery by filing late answers to interrogatories and requests for admission. Fourth, he improperly signaled his client during a deposition by kicking him under the table. Fifth, he refused to stipulate to the authenticity of depositions from the Jack's Tours litigation where Miyashiro had admitted to fraud and embezzlement in the family business, forcing Roehrig's lawyers to call reporters to authenticate the obviously authentic documents.

At the hearing on Miyashiro's third *pro hac vice* motion, Gierlach again argued that Albertini had spent more time working on the case than he had, and that he was too busy to proceed with trial as lead counsel. 9/19/06 Tr. at 18. "It is frankly, going to be a real hardship on myself and on Mr. Miyashiro if that knowledge cannot be used at trial." Id. Judge Masuoka pointed out that Gierlach filed the original complaint in 2003, served as lead counsel for three years, and that Miyashiro expressly agreed with Roehrig in 2005 that Gierlach would retain his role as lead counsel in this case. Id. at 22. The court ruled:

> This court also cautioned you, Mr. Gierlach, that in the event that Mr. Albertini didn't meet the court's professional standards, this court would revoke *pro hac vice* status and you would have to continue with the case. Likewise, this court also said that the court always considers local counsel as lead counsel but because of the agreement between yourself, Mr. Gierlach, and the opposing counsel saying you would agree to permit him to participate in the preparation of the case but not

> make any presentation to the court, this court, notwithstanding its better judgment, permitted him to come in *pro hac vice* on a limited basis. This court cannot see changing that. If this court were to change, I would go back to its original intention and say, "No, Mr. Gierlach. You originally took the case. You do the case." If you were too busy . . . you should not because you had the case once, so you had an idea of what it was, that it was dismissed without prejudice, and it was filed again. So you knew to a certain extent what the case was about because the rules required you to investigate prior to filing any complaint on behalf of any client. So under the circumstances, since this court has already permitted Mr. Albertini on a limited basis to appear *pro hac vice* and this was the agreement of the other counsel, this court is not going to revoke that order. But nor is it going to permit any expanded participation by Mr. Albertini.

9/19/06 Tr. at 22.

On November 13, 2006, Judge Masuoka filed an order denying Miyashiro's motion to appoint Albertini lead trial counsel. *See* Appendix G.

3. THE PETITION FOR WRIT OF MANDAMUS

On October 5, 2006, Miyashiro filed a petition for writ of mandamus in the Hawaii Supreme Court, asking that court to find that Judge Masuoka committed a "flagrant abuse of discretion" in refusing to appoint a California attorney as his lead trial counsel. *See* Petition, Appendix B. "Miyashiro has a constitutional right, grounded in the Fifth Amendment of the United States Constitution, to counsel of his choice in a civil case." Id. at 10. "He is

denied his counsel in the face of only specious reasoning." Id. "Neither Judge Ibarra nor Judge Masuoka have given reasonable explanations as to why *pro hac vice* status for trial has been denied." Id. at 13. On November 1, 2006, the Hawaii Supreme Court denied this petition:

> Granting Eugene Albertini full *pro hac vice* status in Civil No. 04-1-0211 was within the discretion of the circuit judge, *see* RSCSH 1.9, and the refusal to do so for the reasons for which *pro hac vice*, appearance was initially denied was not a flagrant and manifest abuse of discretion.

Petition, Appendix A at 1.

4. THE STATE COURT APPEAL

On January 11, 2007, Judge Masuoka filed an Amended Final Judgment dismissing all claims against Roehrig. *See* Appendix F. On January 22, 2007, Miyashiro appealed. *See* Appendix H. On January 29, 2007, he filed a statement of points on appeal including "whether the trial court erroneously failed to grant full *pro hac vice* status to Eugene J. Albertini." *See* Appendix I at 2.

As such, there has been no final ruling by the Hawaii Supreme Court on Albertini's *pro hac vice* status or Miyashiro's claim that he has a constitutional right to choose out-of-state counsel in a civil case. Moreover, the issue was not finally decided in the State mandamus proceeding, since the standard of review for an extraordinary writ is far higher than that of an ordinary appeal.

ARGUMENT

A. IN VIEW OF THE TRIAL COURT'S DISMISSAL OF THIS MALPRACTICE ACTION, BASED ON PETITIONER'S ACKNOWLEDGED EMBEZZLEMENT AND BREACH OF FIDUCIARY DUTY, THIS COURT SHOULD ALSO REFUSE TO ASSIST HIM IN HIS ATTEMPTS TO USE JUDICIAL PROCESS TO BENEFIT FROM HIS OWN FRAUDULENT CONDUCT.

On January 11, 2007, Judge Masuoka filed an Amended Judgment dismissing all Miyashiro's malpractice claims, based, in part, "on Plaintiff's admitted embezzlement and breach of fiduciary duty." *See* Appendix D. In his 2004 lawsuit, Miyashiro claimed that Roehrig, Judge Hara and their law firm breached an attorney/client agreement with him when they refused to aid his illegal and immoral conduct and improperly disclosed his embezzlement from Jack's Tours, which resulted in his expulsion from his family's successful transportation and tour company, and substantial loss of income. Judge Masuoka thereby refused to "aid a tortfeasor who invokes the court's jurisdiction to relieve it of the consequences of fraud." *Bondi v. Thornton International*, 421 F.Supp.2d 703, 713 (S.D.N.Y. 2006). This Court should do the same.

"The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract." *Kaiser Steel v. Mullins*, 455 U.S. 72, 77 (1982). "Denying judicial relief from an admitted wrongdoer is an effective means of deterring illegality." *Bateman Eichler, Hill Richards v. Berner*, 472 U.S. 299, 306 (1985); *see also*, *McMullen v. Hoffman*, 174 U.S. 639, 669 (1899) ("in that way the public secures the benefit of a rigid adherence to

the law"); *Higgins v. McCrea*, 116 U.S. 671, 685 (1886) ("he who comes here for relief must draw his justice from pure fountains"); *Nisselson v. Lernout*, 469 F.3d 143, 152 (1st Cir. 2006) ("a basis for dismissing suits whenever a plaintiff has played any role in the harm producing activity"); *Knauer v. Jonathon Roberts Fin. Group*, 348 F.3d 230, 235 (7th Cir. 2003) ("the wrongdoer must not be allowed to profit from his wrong"); *Arena Football League v. Roemer*, 9 F.Supp.2d 889, 898 (D.Ill. 1998) ("courts will not aid a fraudfeasor who invokes the court's jurisdiction to relieve him of the consequences of his fraud"); *Choquette v. Isacoff*, 836 N.E.2d 329, 332 (Mass.App. 2005) ("courts will not lend aid to parties who base their cause of action on their own immoral or illegal acts"); *Mettes v. Quinn*, 411 N.E.2d 549, 551 (Ill.App. 1980) ("this refusal to aid derives not from the consideration of the defendant, but from a desire to see that those who transgress the moral or criminal code shall not receive aid from the judicial branch of government.")

This doctrine has also been applied to legal malpractice claims, where courts have uniformly refused to award damages to clients who have committed fraud. "Since the basis of the plaintiff's action in the present case is an attempt to reduce the economic consequences of his fraudulent conduct by recovering from his attorney, we hold that the trial court did not err in dismissing the complaint with prejudice." *Goldstein v. Lustig*, 507 N.E.2d 164, 170 (Ill.App. 1987); *see* also, *Pantely v. Garris, Garris & Garris*, 447 N.W.2d 864, 869 (Mich.App. 1989) ("the proximate cause of Pantely's claimed injuries was her act of knowingly committing perjury"); *Evans v. Cameron*, 360 N.W.2d 25 (Wis. 1985) ("although the public interest is served by discouraging attorney misconduct, it would be

inappropriate to promote that interest by removing the damage to those who deliberately and willfully lie under oath in bankruptcy proceedings"); *Robins v. Lasky*, 462 N.E.2d 774, 779 (Ill.App. 1984) ("we pass no judgment on the advice given by the defendants, as our refusal to aid the plaintiff is a decision based upon his admitted attempt to evade the law.")

B. PETITIONER DOES NOT HAVE A CONSTITUTIONAL RIGHT TO CHOOSE OUT-OF-STATE LEAD TRIAL COUNSEL IN A CIVIL CASE, ESPECIALLY IN LIGHT OF COUNSEL'S DISQUALIFICATION BY A CALIFORNIA COURT, MULTIPLE *PRO HAC VICE* APPEARANCES, UNAUTHORIZED PRACTICE OF LAW, DISCOVERY MISCONDUCT, AND A STIPULATION BY PETITIONER THAT HIS *PRO HAC VICE* LAWYER BE LIMITED TO A SUPPORTING ROLE.

"Since the founding of the Republic," this Court declared in 1979, "the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions." *Leis v. Flynt*, 439 U.S. 438, 442 (1979). "The States prescribe the qualifications for admission to practice and the standards of professional conduct." Id. "The Constitution does not require that because a lawyer has been admitted to the bar of one State, he or she must be allowed to practice in another." Id. at 443. While "the practice of courts in most States is to allow an out-of-state lawyer the privilege of appearing upon motion," the Court declared, "it is not a right granted either by statute or the Constitution." Id. at 441-442. "There is no right of federal origin that permits

such lawyers to appear in state courts without meeting that State's bar admission requirements." Id. at 443.

Although the *Leis* Court held that out-of-state lawyers have no constitutional right to appear *pro hac vice* in a civil case, it "did not reach the issue of whether the constitutional rights of [the parties] had also been violated." Id. at 442 n.4. To date, this Court has not exprcssly ruled on whether civil litigants have such a right, although the holding in *Leis* clearly suggested (as the dissent itself noted) "that a client's interest in having out-of-state counsel is implicated by this decision." Id. Indeed, how could State and federal courts enforce the holding in *Leis* if out-of-state counsel can avoid its mandate by merely having his client appeal the denial of his *pro hac vice* status, such as occurred here? *See Kentucky West Virginia Gas Company v. Pennsylvania Public Utility Commission*, 837 F.2d 600, 618 (3d Cir.), *cert. denied*, 488 U.S. 941 (1988) ("[t]he Supreme Court has not recognized a constitutional right to counsel in a civil case"); *Obert v. Republic Western Insurance Company*, 190 F.Supp.2d 279, 298 (D.R.I. 2002) ("Republic Western has no constitutional right to counsel of its choice.")

Miyashiro makes much of this Court's recent ruling in *United States v. Cuauhtemoc Gonzalez-Lopez*, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006), where it addressed the question of a defendant's right to choose out-of-state counsel in a criminal case. The *Gonzalez-Lopez* Court was not asked to decide whether the 6th Amendment right to choice of counsel in a criminal prosecution includes out-of-state lawyers, since that issue was abandoned by the Government before the case reached the Supreme Court. *See* 126 S.Ct. at 2561 ("the government does not dispute the 8th Circuit's conclusion in this case that the District

Court erroneously deprived respondent of his counsel of choice.") Regardless, the Court did not dispute the 8th Circuit's finding that Gonzalez-Lopez had a 6th Amendment right to choose a California lawyer to represent him in a Missouri prosecution. Id.

Neither *Gonzales-Lopez* nor the 6th Amendment, however, mentions civil litigants. The right to counsel in a civil case – to the extent it exists – has been found in the due process clauses of the 5th and 14th Amendments, not the 6th. *See Obert*, supra, 190 F.Supp.2d at 298. According to the *Obert* court:

> The right to practice *pro hac vice* before a court is not granted by statute or by the Constitution. [Citing *Leis*.] In criminal cases, courts must comply with the Sixth Amendment requirements of a defendant's right to counsel of his choice. This right, however, is not absolute and may give way to the court's need to control the orderly conduct of justice. See, *United States v. Collins*, 920 F.2d 619, 624-26 (10th Cir. 1990). *The instant case, of course, is a civil action, and Republic Western has no constitutional right to counsel of his choice.*

Obert, supra, 190 F.Supp.2d at 298 (emphasis added). "We note at the outset that certain distinctions can be made between the rights of civil litigants and those of criminal defendants," observed another court. *Potashnick v. Port City Construction Company*, 609 F.2d 1101, 1118 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980). "A criminal defendant faced with a potential loss of personal liberty has much more at stake than a civil litigant asserting or contesting a claim for damages," the *Potashnick* court noted, "and for this reason *the law affords greater protection to the criminal defendant's rights*." Id. (emphasis added). Again, "[t]he

Supreme Court has not recognized a constitutional right to counsel in a civil case." *Kentucky West Virginia Gas Company*, *supra*, 837 F.2d at 618. Nor has this Court ever ruled, as Miyashiro contends it has, that a plaintiff in a legal malpractice action has a constitutional or federal statutory right to have the trial court appoint a *pro hac vice* lawyer as lead trial counsel.

According to Miyashiro, he has a constitutional right to have the Hawaii courts permit him to use an out-of-state lawyer as lead counsel in a civil case. Unless a Hawaii court finds Albertini "unfit," insists Miyashiro, it must allow this California lawyer unlimited access to its courts.

Miyashiro is mistaken.

First, neither this Court nor any lower federal court has ever ruled that civil litigants have a constitutional right to choose out-of-state lawyers as their lead counsel under the *pro hac vice* rules. Judge Masuoka allowed Albertini to serve as Miyashiro's second lawyer, and he is already represented by Gierlach, an able and experienced Hawaii counsel of his choice. *See*, *e.g.*, *Meschi v. Iverson*, 805 N.E.2d 72, 74 (Mass.App. 2004) ("Mr. Ryan's colleagues, as members of the Massachusetts bar, were and are available to represent the plaintiffs [and may] enjoy the benefit of Mr. Ryan's consultation and advice in that exercise.")

Second, "*pro hac vice*" means "for this one occasion." *Obert, supra*, 190 F.Supp.2d at 297. As noted, Albertini has already been granted *pro hac vice* status four times in Hawaii's courts, and his repeated appearances in that regard suggest he is utilizing that status to circumvent the licensing requirements complied with by every other

lawyer practicing in the State. This alone is grounds for Hawaii's judges to limit Albertini's participation in this case.

Third, contrary to Miyashiro's claims in the Petition, Roehrig introduced substantial evidence of misconduct, unethical behavior, and other problems that made it inadvisable to appoint Albertini lead counsel, including the unauthorized practice of law before being granted limited *pro hac vice* status, and extensive discovery violations. *See Obert, supra*, 190 F.Supp.2d at 298 ("this right, however, is not absolute and may give way to the court's need to control the orderly conduct of justice.")

Fourth, Albertini was criticized in a 1980 California decision cited over 170 times since its publication as a classic example of attorney disqualification based on improper contact with opposing parties. *See Chronometrics, supra*. Clearly that case, which was misrepresented by Albertini during Judge Ibarra's October 11, 2004, hearing and omitted from the Petition before this Court, is grounds alone to limit his *pro hac vice* participation to a supporting role in this case. *See, e.g., Meschi, supra*, 805 N.E.2nd at 74, n.9 ("his decision to address [the opposing party] raises serious questions bearing adversely on whether to extend to him permission to act as Massachusetts [*pro hac vice*] counsel in the instant matter.")

C. PETITIONER FAILS TO INFORM THIS COURT THAT JUDGMENT HAS BEEN ENTERED AGAINST HIM IN THIS MALPRACTICE CASE, PETITIONER HAS APPEALED TO THE HAWAII APPELLATE COURTS, AND HE HAS LISTED THIS *PRO HAC VICE* RULING IN HIS POINTS ON APPEAL.

This Petition for Writ of Certiorari is misleading on the subject of finality. Miyashiro suggests a trial is pending in State court, and that absent this Court's immediate intervention, he will be denied his right to out-of-state lead trial counsel of his choice. In fact, before this Petition was filed, Judge George Masuoka granted four separate summary judgment motions (opposed in pleadings drafted by lawyer Albertini) and filed a judgment in Roehrig's favor on all claims. Miyashiro has noticed an appeal to the Hawaii Intermediate Court of Appeals, and filed a declaration listing the three *pro hac vice* trial orders challenged here as one of his grounds for reversal on appeal. As such, Hawaii's appellate courts have yet to finally rule on the issue before this Court.

"Under 28 U.S.C. § 1257(a) this Court's jurisdiction is limited to review of 'final judgments or decrees rendered by the highest court of a State in which the decision could be had.'" *Johnson v. California*, 541 U.S. 428, 429 (2004). "Compliance with the provisions of Section 1257 is an essential prerequisite to our deciding the merits of a case brought here under that section." Id. at 431; *see also*, *Flynt v. Ohio*, 451 U.S. 619, 620 (1981) ("[i]n general, the final judgment rule has been interpreted to preclude reviewability where anything further remains to be determined by a State court[.]") "The finality requirement," this Court has said:

> serves several ends: (1) it avoids piecemeal review of State court decisions; (2) it avoids giving advisory opinions in cases where there may be no real "case" or "controversy," [and] (3) it limits review of State court determinations of federal constitutional issues to leave at a minimum federal intrusion into State affairs.

North Dakota State Board of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156, 159 (1973). "This requirement is not one of those technicalities to be easily scorned," the Court declared, "[i]t is an important factor in the smooth working of our federal system." Id., quoting *Radio Station WOW v. Johnson*, 326 U.S. 120, 124 (1945).

There are exceptions to this rule. "Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction." Id. "In *Cox Broadcasting Corporation v. Cohen*, 420 U.S. 469, 482 (1975), we described four exceptional categories to be regarded as 'final' on the federal issue despite the ordering of further proceedings in the lower State courts." *Johnson*, supra, 541 U.S. at 429-430. These categories include: (1) cases where the ruling renders further State proceedings preordained; (2) cases where the issue will survive and require decision regardless of further State proceedings; (3) cases where further State proceedings will bar review of an important federal issue; and (4) cases where resolution of the federal issue would be preclusive of any further State proceedings. *Cox Broadcasting*, 420 U.S. at 482. None of these exceptions apply here.

First, as noted, judgment has been entered in this case and Miyashiro has noticed an appeal in Hawaii's appellate courts. *See* Appendix E. He has filed a declaration of points

on appeal including the three *pro hac vice* rulings entered by the trial court which he would have this Court review by certiorari. *See* Appendix F.

Second, these *pro hac vice* trial rulings will be reviewed by the Hawaii Intermediate Court of Appeals, and if necessary, the Hawaii Supreme Court, for abuse of discretion. A different standard of review attaches to a petition for writ of mandamus. "A writ of mandamus," the Hawaii Supreme Court noted in its order, "will not issue unless the petition demonstrates a clear and indisputable right to relief and a lack of alternative means to redress adequately the alleged wrong or obtain the requested relief." *See* Petition, Appendix A at 1, citing *Kema v. Gaddis*, 982 P.2d 334, 338 (Hawaii 1999). "Where a court has discretion to act, mandamus will not lie to interfere with or control the exercise of that discretion, even when the judge has acted erroneously, unless the judge has exceeded his or her jurisdiction, has committed a flagrant and manifest abuse of discretion, or has refused to act on a subject properly before the court[.]" Id. A ruling based on this limited standard of review is therefore not binding in Miyashiro's pending State court appeal.

While this Court has permitted interlocutory review of collateral orders during civil litigation, it has limited such review to orders "effectively unreviewable on appeal from a final judgment." *Firestone Tire and Rubber v. Risjord*, 449 U.S. 368, 374 (1981); *see also*, *United States v. McDonald*, 435 U.S. 850, 860 (1978) ("the legal and practical value of which would be destroyed if it were not vindicated before trial.") In this case, the trial court's *pro hac vice* rulings are clearly "reviewable," and will be reviewed in Miyashiro's State court appeal. "The resolution of this question can await final judgment without any adverse

effect upon important federal interests." *Flynt v. Ohio*, 451 U.S. 619, 622 (1981); *see* also, *Carpenter v. Gomez*, 516 U.S. 981 (1995) ("the issue would remain open for further review when it acts on the direct appeal from petitioner's conviction.")

CONCLUSION

Respondent STANLEY H. ROEHRIG respectfully requests that this Court deny the Petition for Writ of Certiorari.

March 1, 2007

Respectfully submitted,

PETER VAN NAME ESSER
Counsel of Record
KEITH K. HIRAOKA, ESQ.
BRIAN J. DE LIMA, ESQ.

Attorneys for Respondent
Stanley H. Roehrig

Of Counsel:
ROECA, LOUIE & HIRAOKA
A Limited Liability Law Partnership, LLP

KEITH K. HIRAOKA 3423-0
khiraoka@rlhlaw.com
RHONDA L. CHING 8140-0
rching@rlhlaw.com
841 Bishop Street, Suite 900
Honolulu, Hawai'i 96813-3917
Telephone: (808) 538-7500
Facsimile: (808) 521-9648

CRUDELE & DE LIMA
Attorneys at Law, A Law Partnership

BRIAN J. DE LIMA 3407-0
delima@bigislandlawyers.com
101 Aupuni St., Suite 133
Hilo, Hawai'i 96720
Telephone: (808) 969-7707

Attorneys for Defendant
STANLEY H. ROEHRIG, AAL, ALC

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

GEORGE MIYASHIRO, Plaintiff, vs. ROEHRIG, ROEHRIG, WILSON & HARA; STANLEY H. ROEHRIG, AAL, ALC; GLENN S. HARA, AAL; CAROL MIYASHIRO; JEFF MIYASHIRO; TITLE GUARANTY CO.	**CIVIL NO. 04-1-0211** (Hilo) ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BASED ON PLAINTIFF'S ADMITTED EMBEZZLEMENT AND BREACH OF FIDUCIARY DUTY (FILED SEPT. 11, 2006)

and DOE DEFENDANTS 1-100, Defendants.	) Date: October 16, 2006) Time: 1:00 p.m.) Judge: George M. Masuoka) (Filed Dec. 28, 2006))

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BASED ON PLAINTIFF'S ADMITTED EMBEZZLEMENT AND BREACH OF FIDUCIARY DUTY (FILED SEPT. 11, 2006)

Defendant's Motion for Summary Judgment Based on Plaintiff's Admitted Embezzlement and Breach of Fiduciary Duty (Filed Sept. 11, 2006) was heard by the Honorable George M. Masuoka at 1:00 p.m. on October 16, 2006. David J. Gierlach represented Plaintiff. Brian J. De Lima and Keith K. Hiraoka represented Defendant Stanley H. Roehrig, AAL, ALC. The Court, having considered the written and oral submissions of the parties and being fully advised, orders as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's motion be and is hereby GRANTED.

Dated: Lihu'e, Hawai'i, Dec. 28, 2006.

/s/ George M. Masuoka [SEAL]
Judge of the Above-Entitled Court

Of Counsel:
ROECA, LOUIE & HIRAOKA
A Limited Liability Law Partnership, LLP

KEITH K. HIRAOKA 3423-0
khiraoka@rlhlaw.com
RHONDA L. CHING 8140-0
rching@rlhlaw.com
841 Bishop Street, Suite 900
Honolulu, Hawai'i 96813-3917
Telephone: (808) 538-7500
Facsimile: (808) 521-9648

CRUDELE & DE LIMA
Attorneys at Law, A Law Partnership

BRIAN J. DE LIMA 3407-0
delima@bigislandlawyers.com
101 Aupuni St., Suite 133
Hilo, Hawai'i 96720
Telephone: (808) 969-7707

Attorneys for Defendant
STANLEY H. ROEHRIG, AAL, ALC

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

GEORGE MIYASHIRO, Plaintiff, vs. ROEHRIG, ROEHRIG, WILSON & HARA; STANLEY H. ROEHRIG, AAL, ALC; GLENN S. HARA, AAL; CAROL MIYASHIRO; JEFF MIYASHIRO; TITLE GUARANTY CO.	**CIVIL NO. 04-1-0211** (Hilo) ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY ON HAWAI'I RULES OF PROFESSIONAL CONDUCT (FILED SEPT. 11, 2006) Date: October 16, 2006

and DOE DEFENDANTS 1-100,
Defendants.

) Time: 1:00 p.m.
) Judge: George M. Masuoka
) (Filed Dec. 28, 2006)

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON HAWAI'I RULES OF PROFESSIONAL CONDUCT (FILED SEPT. 11, 2006)

Defendant's Motion for Summary Judgment on Hawai'i Rules of Professional Conduct (Filed Sept. 11, 2006) was heard by the Honorable George M. Masuoka at 1:00 p.m. on October 16, 2006. David J. Gierlach represented Plaintiff. Brian J. De Lima and Keith K. Hiraoka represented defendant Stanley H. Roehrig, AAL, ALC. The Court, having considered the written and oral submissions of the parties and being fully advised, orders as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's motion be and is hereby GRANTED.

Dated: Lihu'e, Hawai'i, Dec. 28, 2006.

/s/ George M. Masuoka [SEAL]
Judge of the Above-Entitled Court

Appendix C-1

168 Cal.Rptr. 196

Court of Appeal, Second District, Division 5, California.

CHRONOMETRICS, INC., a California Corporation, and Facit-Chronometrics, Inc., a California Corporation, Cross-Complainants and Appellants,

v.

SYSGEN, INC., Robert J. Schaefer and Harold J. Fatt, Cross-Defendants and Respondents.

Civ. 55128.

Sept. 25, 1980.

Sackin & Middleton, by Louis A. Sackin, Los Angeles, for cross-complainants and appellants.

McKenna & Fitting, Aaron M. Peck, I. Bruce Speiser, and Edmond M. Connor, Los Angeles, for cross-defendants and respondents.

DOWDS,* Associate Justice.

Defendants and cross-complainants in this civil action appeal from an order of court that their attorneys, the firm of Albertini & Gill ("the law firm") be disqualified and prohibited from acting as attorneys of record for or otherwise serving or assisting as counsel to them in such action.[1] This order was issued after a hearing pursuant to an order to show cause which had been issued after notice to Eugene J. Albertini, a member of the law firm. The

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* Assigned by the Chairperson of the Judicial Council.

[1] This order is appealable either as a final order upon a collateral matter under Code of Civil Procedure section 904.1, subdivision (a), or as an order granting an injunction under subdivision (f) of the same statute. (*See Meehan v. Hopps* (1955) 45 Cal.2d 213, 288 P.2d 267; *Kraus v. Davis* (1970) 6 Cal.App.3d 484, 487, 85 Cal.Rptr. 846.)

application for the order to show cause was supported by declarations of Harold Fatt, Morton Stein, and I. Bruce Speiser.

Fatt's declaration stated that he is a defendant in *Marshall, etc. v. Schaefer, et al.*, L.A.S.C. No. WEC 42370 and a cross-defendant in *Chronometrics, Inc., et al. v. Sysgen, Inc., et al.*, L.A.S.C. No. WEC 39344 ("the litigation") and that at all times since the inception of the litigation the law firm has been counsel of record for parties adverse to him. He further stated that on or about July 14, 1978, he received a telephone call from Albertini who said he was calling in his capacity as counsel for Gourmet Wines, Ltd., an entity with which Fatt had been associated, and as President of Chronometrics, Inc., an entity of which Fatt is a shareholder. Albertini stated his call had nothing to do with the litigation, but in fact during the conversation he said he was surprised Fatt was represented by the same counsel as those representing another party, Robert Schaefer, and invited Fatt to visit him in his office so that he could fully advise Fatt of facts relevant to his status in the litigation of which he believed Fatt had no knowledge. Albertini asked whether Fatt knew that, at the time he loaned money to Sysgen, Inc., a party to the litigation, Schaefer, its president, had $120,000 on deposit in a bank. Albertini indicated that there was a possibility that Fatt could be dismissed from the litigation.

Fatt's declaration further stated that Albertini telephoned him frequently in the ensuing days, encouraging him to come to Albertini's office to discuss facts affecting Fatt's position in the litigation and asking him for information concerning matters in issue in the litigation,

including dates relevant to the corporate existence of Sysgen, Inc.

Fatt declared that the longest such telephone call, lasting over 45 minutes, occurred on July 23, 1978, and in such call Albertini asked whether or not Fatt was still a partner with Schaefer and if not when he withdrew, stating that these were "main issues in the litigation," discussed Fatt's supposed unawareness of the assets transferred to Sysgen, Inc., and the source of such assets, asked when Fatt became associated with Sysgen, Inc., and the date on which he terminated such association, characterized Schaefer as a "crook," mentioned his inability to convince the district attorney to prosecute Schaefer, described his persistence in seeking to recover monies supposedly paid by him to Schaefer, discussed Schaefer's supposed failure to pay his bills, despite the fact that he purportedly had received approximately $100,000 by virtue of a loan on his house, inquired whether Sysgen, Inc., was based in Warren, Ohio, and whether such presence was maintained for the purpose of "hiding funds" so as to avoid an attachment and discussed information germane to Schaefer's activities in the computer software industry. Albertini again urged Fatt to visit with him so that he could apprise Fatt of facts that might cause a change of attitude in the way Fatt viewed the litigation.

In a call on August 4, 1978, according to Fatt's declaration, Albertini "indicated that (Fatt's) counsel of record in the litigation ... was not adequately representing (Fatt's) interests" and again invited his visit. By the third week in August 1978, according to Fatt, he had had eight to ten such telephone conversations with Albertini, all placed by the latter except that in one instance Fatt returned a call made to him while he was in a meeting. In

one of the last conversations, Albertini said that he did not have anything against Fatt but, because Schaefer was hiding his assets, Albertini would be required to satisfy any judgment and accordingly a meeting and eventual settlement would be in Fatt's interest.

Fatt further declared that these discussions made him "very nervous" about his status in the litigation and that he accordingly consulted an attorney other than his counsel of record in the litigation and that attorney communicated with Albertini. On January 16, 1979, Fatt's accountant (Stein) told him he had been called by Albertini who requested him to suggest to Fatt that he (Fatt) meet with Albertini. Fatt then decided, he said, for the first time to advise his counsel of record of these communications and did so on January 31, 1979. His declaration was dated February 2, 1979.

A declaration of Morton Stein averred that on January 14 or 15, 1979, Albertini called him at his residence and requested that he ask Fatt to consider meeting with Albertini concerning litigation involving them. Albertini stated, in response to an inquiry from Stein, that he would insist that Fatt have an attorney present at the meeting. Stein declared that he passed this information on to Fatt on or about January 16, 1979, and within the next few days received a telephone call and a letter from Albertini thanking him for his cooperation.

The third declaration presented in support of the application for an order to show cause was that of I. Bruce Speiser, who declared that he was a member of the State Bar of California, a member of the law firm of McKenna & Fitting, and counsel for Fatt, among others, in the litigation. Speiser declared that he did not learn of the

communications from Albertini to Fatt concerning matters in controversy in said actions until January 26, 1979, and, that neither he nor any other attorney at McKenna & Fitting authorized or consented to such communications.

Declarations of Eugene J. Albertini, Barry I. Gold, and Robert Miles Runyan were filed on the return date of the order to show cause in opposition to the proposed disqualification of the law firm. Albertini denied that he ever discussed settlement with Fatt or any other defendant in the litigation, stated that he had known Fatt for many years and was the attorney for Runyan. He stated that in May or early June 1978, Runyan notified him that he had received intimations through mutual friends of Fatt's and his that Fatt desired to settle the litigation. On June 20, 1978, Albertini declared, he telephoned Fatt, told him he was calling him only as the former attorney of Gourmet Wines and asked Fatt about documents Albertini had been asked to produce as a witness in a certain lawsuit (apparently different from the litigation described above). After this discussion was finished, Albertini averred, Fatt asked if it was all right to talk to Albertini about the current litigation between himself and Chronometrics. Albertini declared that he told Fatt he could only discuss settlement with Fatt in the presence of Fatt's attorney. There was some discussion about Fatt's obtaining attorneys other than McKenna & Fitting. On July 13, 1978, Albertini telephoned Fatt and asked him if he had obtained another attorney for the purpose of entering into settlement negotiations and Fatt said he intended to do so but had not yet found another lawyer and asked Albertini to call back in about a week. On July 20, 1978, Albertini called back and Fatt said he had not yet found another lawyer but would be contacting Albertini shortly. On August 8,

1978, Fatt called Albertini and told him he had retained Jonathan Klar who would be contacting Albertini shortly. On August 23, 1978, Albertini was contacted by Klar and they discussed settlement. Klar said he would look into the matter further and on September 14 and 15, 1978, Albertini and Klar held settlement discussions. Further negotiations by correspondence between Albertini and Klar did not result in a settlement and the negotiations were terminated in a telephone conversation on January 26, 1979. Albertini thereafter called Stein, to find out if he knew whether Fatt was sincere in his expressed desire to settle the litigation. Albertini denied that he ever communicated or discussed with Fatt facts and matters which are the subject of the litigation.

Gold's declaration stated that he was attorney for the plaintiff in an action entitled McHale vs. Hilson, et al., Los Angeles Superior Court No. WEC 32912, and that in connection with that lawsuit he had discussed with Albertini various transactions and documents involving Gourmet Wines and that Albertini had indicated that he would seek out some of the managers or officers of Gourmet Wines and endeavor to obtain information needed in respect of that lawsuit that he did not have.

Runyan's declaration stated that he was president and principal shareholder of a corporation of which Albertini was the attorney and Fatt was a former officer and employee. Runyan declared that about the middle of June 1978, an acquaintance who also knew Fatt told him that Fatt wished to resolve his differences with Runyan and that he informed Albertini of this information a few days later.

On February 21, 1979, the trial court made an order that the law firm be disqualified and prohibited from acting as attorneys of record for or otherwise serving or assisting as counsel to Chronometrics, Inc., and Facit-Chronometrics, Inc., in the instant action and those two corporations have appealed.

(1) Rule 7-103 of the California Rules of Professional Conduct provides in part that "(a) member of the State Bar shall not communicate directly or indirectly with a party whom he knows to be represented by counsel upon a subject of controversy, without the express consent of such counsel." It is undisputed in the opposing declarations that Albertini did communicate with Fatt without the consent of his attorney of record in the litigation, the only matter controverted being whether the communication was "upon a subject of controversy." The trial court resolved this conflict against appellants. As stated in *Fuller v. Lindenbaum* (1938) 29 Cal.App.2d 227, 230, 84 P.2d 155, 157 "in the consideration of an appeal from an order made upon affidavits involving the decision of a question of fact, an appellate court is bound by the same rule that controls it where oral testimony is presented for review. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered established."[2]

Accordingly, we must take as true the fact that Albertini communicated with Fatt respecting a subject of controversy, knowing that he was represented by counsel, without the consent of such counsel, and thus violated rule

[2] A declaration under penalty of perjury is the legal equivalent of an affidavit under Code of Civil Procedure section 2015.5.

7-103 of the Rules of Professional Conduct (West's Ann.Bus. & Prof.Code (1974 ed., 1980 cum.supp.), § 6076, at p. 96; Deering's Cal.Codes Ann.Rules (1980 ed.) at p. 293). Whether such a violation authorizes the trial court to disqualify him and his law firm from acting as counsel in an action which related to the subject in controversy appears not to have been directly decided in California. Respondents cite four federal cases which they contend support their position that a trial court has authority to disqualify an attorney and his law firm from continuing to represent a party "when the attorney compromises the integrity of the litigation through a breach of legal ethics." They particularly rely on the language of *Ceramco, Inc. v. Lee Pharmaceuticals* (2d Cir. 1975) 510 F.2d 268, 270-271: "The district court was incorrect in its view that the various bar associations constitute the only proper forum for investigation of a claim of professional misconduct. On the contrary, the courts have not only the power but also the duty and responsibility to disqualify counsel for unethical conduct prejudicial to his adversaries."

The holding of the *Ceramco* case does not necessarily support respondents' position. The court's jurisdiction over the defendant Lee Pharmaceuticals and the propriety of venue in the Eastern District of New York were issues in the case. An attorney associated with the law firm representing the plaintiff telephoned defendant's order department and, without identifying himself, asked for and obtained the names of customers with whom defendant did business in that district. The court of appeals affirmed the denial by the district court of defendant's motion to disqualify the law firm representing plaintiff. While, it said, the lawyer's conduct was not to be commended, it was not the kind of conduct which prior decisions indicated should

result in disqualification. It pointed out that the circumstances of such cases indicating "the need to enforce the lawyer's duty of absolute fidelity and to guard against the inadvertent use of confidential information" were not present in the case under consideration and no other compelling reason for disqualification appeared. (*Id.* at p. 271.)

In *United States v. Clarkson* (4th Cir. 1977) 567 F.2d 270, a lawyer who prepared tax returns for taxpayers and was later accused of criminal tax fraud was disqualified from further representing taxpayers on tax matters because of at least a potential conflict of interest. The trial court's order finding him in contempt for violating the order was affirmed.

In *Gas-A-Tron of Arizona v. Union Oil Co. of California* (9th Cir. 1976) 534 F.2d 1322, the court of appeals recognized the principle that a lawyer may be disqualified from representing a party against a former client where he may be in a position to use confidential information against such client, but held that the principle had been wrongly applied in the case. Plaintiff's lawyers had been disqualified because an associate of the firm had formerly worked for a large law firm which had represented some of the defendants in certain matters. The order of disqualification was reversed because there was no showing that the lawyer had actually obtained any confidential information or had worked on matters substantially related to the pending litigation.

The fourth federal case cited is *In re Gopman* (5th Cir. 1976) 531 F.2d 262. In that case, because of an obvious

conflict of interest, a lawyer was disqualified from simultaneously representing in a grand jury investigation certain labor unions and certain officers thereof.

For California authority, respondents cite Code of Civil Procedure section 128, which states: "Every court shall have power: . . . To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto; . . . " They also refer us to *Comden v. Superior Court* (1978) 20 Cal.3d 906, 145 Cal.Rptr. 9, 576 P.2d 971, which upheld a court order requiring a law firm representing the plaintiff to withdraw from the case on the ground that Rule 2-111(A)(4) of the Rules of Professional Conduct, as it then existed, required withdrawal when the attorney "knows or should know that he . . . ought to be called as a witness on behalf of his client. . . . " They particularly call our attention to footnote 4 found on page 916, 145 Cal.Rptr. at 13-14, 576 P.2d at 975-76 of that case, where the Supreme Court said:

> "Application of rule 2-111 is not limited to breaches of standards of conduct for which discipline may be imposed, although the rule manifestly has application for that purpose. (*See* Bus. & Prof.Code, §§ 6076, 6077.) We have this year held that a trial court has authority to recuse a prosecutor on the basis that he may be biased against a defendant. (*People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 137 Cal.Rptr. 476, 561 P.2d 1164) We noted in that case: 'It has long been established in civil cases that the court has the power, on motion of a party, to disqualify an opposing attorney from participating in a trial when, for example, the attorney improperly seeks

> to proceed against a former client. (Citations.)' (*Id.* at pp. 263-264(, 137 Cal.Rptr. 476, 561 P.2d 1164); *see also Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564(, 15 P.2d 505); *Big Bear Mun. Water Dist. v. Superior Court* (1969) 269 Cal.App.2d 919(, 75 Cal.Rptr. 580)) Although there may be greater reason for disqualifying an attorney in a conflict of interest case, the court nevertheless has authority to disqualify in any instance when, as here, the court reasonably deems it necessary to ' . . . control in furtherance of justice, the conduct of its ministerial officers. . . . ' (Code Civ.Proc., § 128; *see People v. Superior Court, supra*, 19 Cal.3d 255, 261, fn. 4(, 137 Cal.Rptr. 476, 561 P.2d 1164.))"

In *Bauguess v. Paine* (1978) 22 Cal.3d 626, 150 Cal.Rptr. 461, 586 P.2d 942, the Supreme Court reversed an order requiring a party's attorney to pay an opposing party's attorney's fees occasioned by a mistrial which the trial court believed was caused by the misconduct of the attorney against whom the sanction was levied. The court recognized that all courts have supervisory or administrative powers to enable them to carry out their duties and that this power has been expressly recognized by the Legislature in Code of Civil Procedure section 128. (*Id.* at pp. 634-636, 150 Cal.Rptr. 461, 586 P.2d 942.) It pointed out that the traditional American practice has been for each party to bear his or her attorney's fees and determined that the case it was considering did not fall within any of the recognized exceptions to the rule. (*Id.* at pp. 634-637, 150 Cal.Rptr. 461, 586 P.2d 942.) It then considered whether the court might award attorney's fees as a sanction under its supervisory power. It recognized that "(p)ursuant to this power, a court may take appropriate action to secure compliance with its orders, to punish

contempt, and to control its proceedings." (*Id.* at p. 637, 150 Cal.Rptr. at p. 467, 586 P.2d at p. 948.) It declined, however, to permit the award of attorney's fees as a sanction for misconduct, stating: "It would be both unnecessary and unwise to permit trial courts to use fee awards as sanctions apart from those situations authorized by statute. If an attorney's conduct is disruptive of court processes or disrespectful of the court itself, there is ample power to punish the misconduct as contempt." (*Id.* at pp. 637-638, 150 Cal.Rptr. at pp. 467-68, 586 P.2d at pp. 948-49.) While the award of attorney's fees is a different situation from the instant case, the teaching of Bauguess as applied to this case is that the power of a trial court to control its proceedings is not unlimited and the availability of remedies other than sanctions unauthorized by statute should be considered.

Pepper v. Superior Court (1977) 76 Cal.App.3d 252, 142 Cal.Rptr. 759, is a case involving to some extent Rule 7-103 of the Rules of Professional Conduct. An attorney brought on behalf of a client a class action against a country club of which both the attorney and the client were members, alleging that the club's imposition of transfer fees upon sales of memberships was illegal and contrary to the club's bylaws. The trial court disqualified the attorney on the basis of what it perceived to be a conflict of interest because of the attorney's membership in the defendant club. The attorney sought a writ of mandate from the Court of Appeal, which was denied because, the appellate court determined, he had unclean hands in that he had communicated directly with the Board of Directors of the club about the litigation without the consent of its counsel in violation of Rule 7-103. The client then died, naming the attorney as his co-executor. The trial court

denied the attorney's motion to be substituted as party plaintiff for the deceased client and the attorney again sought a writ of mandate, this time successfully. The Court of Appeal held that the unclean hands with which it had previously been concerned was in a different transaction, though a related one, from the instant matter, that its effect had been substantially attenuated by the death of the client and that the petition could not longer be denied on that basis. It concluded that the attorney's membership in the club did not in itself create a conflict of interest which would bar him from suing the club, decided that he was entitled to be substituted as party plaintiff as the co-executor and ordered the trial court to vacate its order denying the substitution. While there are obviously some differences from the instant case, Pepper indicates that a violation of Rule 7-103 should not necessarily bar an attorney for all time from participating in a lawsuit in connection with which the violation occurred.

The Supreme Court has stated in respect of Rule 12, the predecessor of Rule 7-103, that "The rule was designed to permit an attorney to function adequately in his proper role and to prevent the opposing counsel from impeding his performance in such role." (*Mitton v. State Bar* (1969) 71 Cal.2d 525, 534, 78 Cal.Rptr. 649, 654, 455 P.2d 753, 758; *Abeles v. State Bar* (1973) 9 Cal.3d 603, 609, 108 Cal.Rptr. 359, 510 P.2d 719.)

(2) We detect a common theme in the cases relating to disqualification of attorneys by trial courts. If the status or misconduct which is urged as a ground for disqualification will have a continuing effect on the judicial proceedings which are before the court, it is justified in refusing to permit the lawyer to participate in such proceedings. Thus a disqualification is proper for conflict of interest and,

under a rule of professional conduct as it existed at the time of the opinion in *Comden v. Superior Court, supra,* when he ought to be a witness in a forthcoming trial. If, on the other hand, the court's purpose is to punish a transgression which has no substantial continuing effect on the judicial proceedings to occur in the future, neither the court's inherent power to control its proceedings nor Code of Civil Procedure section 128 can be stretched to support the disqualification.

(3) In applying this principle to the instant case, we recognize that such information as Albertini may have learned from Fatt cannot be unlearned and that, whether Albertini is or is not disqualified as counsel, he can use this information as President of Chronometrics. Still it cannot be said that the court's order served no useful purpose in exercising proper control of the proceedings before the court. As counsel, Albertini would have the improperly obtained facts instantly available in his mind in questioning witnesses, making and responding to objections and addressing the court and jury. Albertini as counsel would be in quite a different position from a substituted counsel who might acquire such information second hand by discussions with Albertini before or after court sessions or during recesses. It was not an abuse of the court's discretion to refuse to permit the wrongfully obtained information to be used by Albertini directly in the proceedings before the court. The extension of the disqualification beyond Albertini personally to his law firm has, however, no purpose but a punitive one.[3] As we have

[3] We assume that, as was reported to us by counsel at oral argument, Fatt is no longer a party to the lawsuit and we take that fact into consideration. We express no opinion as to the propriety of the

(Continued on following page)

indicated, such purposes should be accomplished through established disciplinary proceedings.

The order is modified to provide for the disqualification of Eugene J. Albertini, personally, rather than the law firm of Albertini & Gill, in this action and, as modified, the order is affirmed. Each side shall bear its own costs on appeal.

KAUS, P. J., and STEPHENS, J., concur.

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disqualification of an entire law firm in a case such as this if the opposing party wrongfully contacted remains in the action.

Appendix D-1

Of Counsel:
ROECA, LOUIE & HIRAOKA
A Limited Liability Law Partnership, LLP

KEITH K. HIRAOKA 3423-0
khiraoka@rlhlaw.com
RHONDA L. CHING 8140-0
rching@rlhlaw.com
841 Bishop Street, Suite 900
Honolulu, Hawai'i 96813-3917
Telephone: (808) 538-7500
Facsimile: (808) 521-9648

CRUDELE & DE LIMA
Attorneys at Law, A Law Partnership

BRIAN J. DE LIMA 3407-0
delima@bigislandlawyers.com
101 Aupuni St., Suite 133
Hilo, Hawai'i 96720
Telephone: (808) 969-7707

Attorneys for Defendant
STANLEY H. ROEHRIG, AAL, ALC

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

GEORGE MIYASHIRO, Plaintiff, vs. ROEHRIG, ROEHRIG, WILSON & HARA; STANLEY H. ROEHRIG, AAL, ALC; GLENN S. HARA, AAL; CAROL MIYASHIRO; JEFF MIYASHIRO; TITLE GUARANTY CO.	**CIVIL NO. 04-1-0211** (Hilo) **AMENDED FINAL JUDGMENT** (Filed Jan. 11, 2007)

and DOE DEFENDANTS 1-100, Defendants.)

AMENDED FINAL JUDGMENT

Pursuant to Haw. R. Civ. P. 58, judgment is hereby entered in favor of Defendant STANLEY H. ROEHRIG, Attorney at Law, A Law Corporation and against Plaintiff GEORGE MIYASHIRO as to all claims alleged in Plaintiff's First Amended Complaint (filed on August 4, 2004).

Pursuant to Haw R. Civ. P. 58, judgment is hereby entered in favor of Defendant TITLE GUARANTY ESCROW SERVICES, INC. and against Plaintiff GEORGE MIYASHIRO as to all claims alleged in Plaintiff's First Amended Complaint (filed on August 4, 2004).

All claims against Defendants CAROL MIYASHIRO and JEFF MIYASHIRO were dismissed by notice filed pursuant to Haw. R. Civ. P. 41(a)(1)(A) on October 20, 2004.

All claims against Defendants GLENN S. HARA and ROEHRIG, ROEHRIG, WILSON & HARA were dismissed with prejudice by stipulation and order entered on September 1, 2005.

All claims not specifically identified above are hereby dismissed without prejudice.

Dated: Lihu'e, Hawai'i, JAN 11 2007.

[SEAL] /s/ George M. Masuoka
Judge of the Above-Entitled Court

Appendix D-3

APPROVED AS TO FORM:

_____

DAVID J. GIERLACH
EUGENE J. ALBERTINI
Attorneys for Plaintiff

Appendix E-1

Of Counsel:
ROECA, LOUIE & HIRAOKA
A Limited Liability Law Partnership, LLP
ARTHUR F. ROECA 1717-0
aroeca@rlhlaw.com
KEITH K. HIRAOKA 3423-0
khiraoka@rlhlaw.com
841 Bishop Street, Suite 900
Honolulu, Hawai'i 96813-3917
Telephone: (808) 538-7500
Facsimile: (808) 521-9648
Attorneys for Defendants
ROEHRIG, ROEHRIG, WILSON & HARA,
and GLENN S. HARA

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
STATE OF HAWAI'I

GEORGE MIYASHIRO, Plaintiff, vs. ROEHRIG, ROEHRIG, WILSON & HARA; STANLEY H. ROEHRIG, AAL, ALC; GLENN S. HARA, AAL; CAROL MIYASHIRO; JEFF MIYASHIRO; TITLE GUARANTY CO. and DOE DEFENDANTS 1-100, Defendants.	**CIVIL NO. 04-1-0211** ORDER DENYING WITHOUT PREJUDICE PLAINTIFF'S MOTION TO ALLOW EUGENE J. ALBERTINI TO APPEAR AS COUNSEL *PRO HAC VICE* FILED SEPTEMBER 16, 2004 Hearing Date: October 11, 2004 Time: 11:00 a.m. Judge: Ronald Ibarra (Filed Oct. 27, 2004)

Appendix E-2

ORDER DENYING WITHOUT PREJUDICE PLAINTIFF'S MOTION TO ALLOW EUGENE J. ALBERTINI TO APPEAR AS COUNSEL *PRO HAC VICE* FILED SEPTEMBER 16, 2004

Plaintiff's Motion to Allow Eugene J. Albertini to Appear as Counsel *Pro Hac Vice*, filed September 16, 2004, was heard at 11:00 a.m. on October 11, 2004, by the Honorable Ronald Ibarra. David Gierlach appeared for the Plaintiff. Eugene J. Albertini, the applicant, also appeared. Keith K. Hiraoka appeared for Defendants Roehrig, Roehrig, Wilson & Hara, Stanley H. Roehrig, AAL, ALC and Glenn S. Hara. Brian J. Delima appeared for appeared for [sic] Defendant Stanley H. Roehrig, AAL, ALC. The Court, having considered the written and oral submissions of counsel and the record and files in the case, and being otherwise fully advised, orders as follows;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion to Allow Eugene J. Albertini to Appear as Counsel *Pro Hac Vice* be and is hereby DENIED without prejudice.

Dated: Kealakekua, Hawai'i, OCT 27 2004.

/s/ Ronald Ibarra [SEAL]
Judge of the Above-Entitled Court

APPROVED AS TO FORM:

/s/ David Gierlach
DAVID J. GIERLACH
Attorney for Plaintiff

/s/ Brian DeLima
BRIAN J. DELIMA
Attorney for Defendant
STANLEY H. ROEHRIG, AAL, ALC

Of Counsel:
ROECA, LOUIE & HIRAOKA
A Limited Liability Law Partnership, LLP

KEITH K. HIRAOKA 3423-0
khiraoka@rlhlaw.com
841 Bishop Street, Suite 900
Honolulu, Hawai'i 96813-3917
Telephone: (808) 538-7500
Facsimile: (808) 521-9648

Attorney for Defendants
ROEHRIG, ROEHRIG, WILSON & HARA,
STANLEY H. ROEHRIG, AAL, ALC
and GLENN S. HARA

CRUDELE & DE LIMA
Attorneys at Law, A Law Partnership

BRIAN J. DE LIMA 3407-0
delima@bigislandlawyers.com
101 Aupuni St., Suite 133
Hilo, Hawai'i 96720
Telephone: (808) 969-7707

Attorney for Defendant
STANLEY H. ROEHRIG, AAL, ALC

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

GEORGE MIYASHIRO, Plaintiff, vs. ROEHRIG, ROEHRIG, WILSON & HARA, *et al.*, Defendants.	**CIVIL NO. 04-1-0211** **ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO ALLOW EUGENE J. ALBERTINI TO APPEAR AS COUNSEL *PRO HAC VICE***

Appendix F-2

) Date: April 6, 2005
) Time: 10:00 a.m.
) Judge: George M. Masuoka
) (Filed Sep. 1, 2005)

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO ALLOW EUGENE J. ALBERTINI TO APPEARS AS COUNSEL *PRO HAC VICE*

Plaintiff's Motion to Allow Eugene J. Albertini to Appear as Counsel *Pro Hac Vice* was heard by the Honorable George M. Masuoka at 10:00 a.m. on Wednesday, April 6, 2005. David J. Gierlach appeared for Plaintiff GEORGE MIYASHIRO. George Miyashiro and Eugene J. Albertini attended the hearing. Brian J. De Lima appeared for Defendant STANLEY H. ROEHRIG, AAL, ALC. Keith K. Hiraoka appeared for Defendants ROEHRIG, ROEHRIG, WILSON & HARA, GLENN S. HARA and STANLEY H. ROEHRIG, AAL, ALC. Diana L. Van de Car appeared for Defendant TITLE GUARANTY ESCROW SERVICES, INC. The Court, having considered the written and oral submissions of counsel and the stipulations placed on the record by counsel and agreed to by Plaintiff George Miyashiro and by Eugene J. Albertini, enters the following order:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The motion is granted only with respect to out-of-court proceedings such as depositions, mediation and settlement negotiations. Mr. Albertini shall, as a condition precedent to his limited *pro hac vice* status, file with the Court an annual notice of compliance with Hawai'i Supreme Court Rule 1.9.

2. The motion is denied as to in-court proceedings. Mr. Albertini shall be permitted to attend hearings and other court proceedings with David J. Gierlach, but Mr. Albertini is not allowed to argue or address the Court unless the Court specifically directs a question to Mr. Albertini.

Dated: Lihu'e, Hawai'i, _____.

/s/ George M. Masuoka (seal)
Judge of the Above-Entitled Court

APPROVED AS TO FORM:

/s/ David Gierlach
DAVID J. GIERLACH
Attorney for Plaintiff

/s/ Diana L. Van de Car
DIANA L. VAN DE CAR
Attorney for Defendant
TITLE GUARANTY ESCROW SERVICE, INC.

Of Counsel:
ROECA, LOUIE & HIRAOKA
A Limited Liability Law Partnership, LLP

ARTHUR F. ROECA 1717-0
aroeca@rlhlaw.com
KEITH K. HIRAOKA 3423-0
khiraoka@rlhlaw.com
RHONDA L. CHING 8140-0
rching@rlhlaw.com
841 Bishop Street, Suite 900
Honolulu, Hawai'i 96813-3917
Telephone: (808) 538-7500
Facsimile: (808) 521-9648

CRUDELE & DE LIMA
Attorneys at Law, A Law Partnership

BRIAN J. DE LIMA 3407-0
delima@bigislandlawyers.com
101 Aupuni St., Suite 133
Hilo, Hawai'i 96720
Telephone: (808) 969-7707
Attorneys for Defendant
STANLEY H. ROEHRIG, AAL, ALC

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

GEORGE MIYASHIRO, Plaintiff, vs. ROEHRIG, ROEHRIG, WILSON & HARA; STANLEY H. ROEHRIG, AAL, ALC; GLENN S. HARA, AAL;	) **CIVIL NO.**) **04-1-0211** (Hilo))) **ORDER DENYING**) **PLAINTIFF GEORGE**) **MIYASHIRO'S**) ***RENEWED*** **MOTION**) **TO ALLOW EUGENE J.**) **ALBERTINI TO**) **APPEAR AS COUNSEL**

Appendix G-2

CAROL MIYASHIRO; JEFF MIYASHIRO; TITLE GUARANTY CO. and DOE DEFENDANTS 1-100, Defendants.	) ***PRO HAC VICE* WITH FULL STATUS FILED AUGUST 28, 2006**) Date: September 19, 2006) Time: 1:00 p.m.) Judge: George M. Masuoka) (Filed Nov. 13, 2006)

ORDER DENYING PLAINTIFF GEORGE MIYASHIRO'S *RENEWED* MOTION TO ALLOW EUGENE J. ALBERTINI TO APPEAR AS COUNSEL *PRO HAC VICE* WITH FULL STATUS FILED AUGUST 28, 2006

Plaintiff George Miyashiro's Renewed Motion to Allow Eugene J. Albertini to Appear as Counsel *Pro Hac Vice* with Full Status, filed on August 28, 2006, was heard at 1:00 p.m. on September 19, 2006, by the Honorable George M. Masuoka. David J. Gierlach appeared for the Plaintiff, Keith K. Hiraoka appeared for Defendant Stanley H. Roehrig and Diana L. Van De Car appeared for Defendant Title Guaranty Escrow Services, Inc. The Court, having considered the written and oral submissions of counsel and the record and files in the case, and being otherwise fully advised, orders as follows;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff George Miyashiro's *Renewed* Motion to Allow Eugene J. Albertini to Appear as Counsel *Pro Hac Vice* with Full Status filed on August 28, 2006, be and is hereby DENIED.

DATED: Lihue, Hawai'i, NOV 13 2006.

[SEAL] /s/ George M. Masuoka
Judge of the above-entitled Court

APPROVED AS TO FORM:

/s/ David Gierlach
DAVID J. GIERLACH
Attorney for Plaintiff

DIANA L. VAN DE CAR
Attorney for Defendant
TITLE GUARANTY ESCROW SERVICE, INC.

DAVID J. GIERLACH 5041
500 Ala Moana Boulevard
Suite 330, 5 Waterfront Plaza
Honolulu, Hawaii 96813
Telephone: (808) 523-1332
Facsimile: (808) 526-2275
Email: gierlach33@aol.com

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

GEORGE MIYASHIRO, Plaintiff, vs. ROEHRIG, ROEHRIG, WILSON & HARA; STANLEY H. ROEHRIG, Attorney at Law, ALC; GLENN HARA, Attorney at Law; CAROL MIYASHIRO; JEFF MIYASHIRO; TITLE GUARANTY CO.; AND DOE DEFENDANTS 1-100, Defendants.	) CIVIL NO. 04-1-0211) [Other Civil Action]) NOTICE OF APPEAL OF AMENDED FINAL JUDGMENT, FILED JANUARY 11, 2007; EXHIBIT 1; CERTIFICATE OF SERVICE) (Filed Jan. 22, 2007)) TRIAL: FEBRUARY 20, 2007

NOTICE OF APPEAL OF AMENDED FINAL JUDGMENT, FILED JANUARY 11, 2007

NOTICE IS HEREBY GIVEN that Plaintiff George Miyashiro, by and through his undersigned counsel, and pursuant to *Hawaii Revised Statutes* § 641-11 and Rule 3 of the *Hawaii Rules of Appellate Procedure*, hereby appeals to the Supreme Court of the State of Hawaii from

the Amended Final Judgment, filed January 11, 2007, attached hereto as Exhibit 1.

DATED: Honolulu, Hawaii, January 22, 2007.

/s/ David J. Gierlach
DAVID J. GIERLACH
Attorney for Plaintiff

Of Counsel:
ROECA, LOUIE & HIRAOKA
A Limited Liability Law Partnership, LLP

KEITH K. HIRAOKA 3423-0
khiraoka@rlhlaw.com
RHONDA L. CHING 8140-0
rching@rlhlaw.com
841 Bishop Street, Suite 900
Honolulu, Hawai'i 96813-3917
Telephone: (808) 538-7500
Facsimile: (808) 521-9648

CRUDELE & DE LIMA
Attorneys at Law, A Law Partnership

BRIAN J. DE LIMA 3407-0
delima@bigislandlawyers.com
101 Aupuni St., Suite 133
Hilo, Hawai'i 96720
Telephone: (808) 969-7707

Attorneys for Defendant
STANLEY H. ROEHRIG, AAL, ALC

Appendix H-3

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

GEORGE MIYASHIRO, Plaintiff, vs. ROEHRIG, ROEHRIG, WILSON & HARA; STANLEY H. ROEHRIG, AAL, ALC; GLENN S. HARA, AAL; CAROL MIYASHIRO; JEFF MIYASHIRO; TITLE GUARANTY CO.; and DOE DEFENDANTS 1-100, Defendants.	**CIVIL NO. 04-1-0211** (Hilo) **AMENDED FINAL JUDGMENT** (Filed Jan. 11, 2007)

AMENDED FINAL JUDGMENT

Pursuant to Haw. R. Civ. P. 58, judgment is hereby entered in favor of Defendant STANLEY H. ROEHRIG, Attorney at Law, A Law Corporation and against Plaintiff GEORGE MIYASHIRO as to all claims alleged in Plaintiff's First Amended Complaint (filed on August 4, 2004).

Pursuant to Haw. R. Civ. P. 58, judgment is hereby entered in favor of Defendant TITLE GUARANTY ESCROW SERVICES, INC. and against Plaintiff GEORGE MIYASHIRO as to all claims alleged in Plaintiff's First Amended Complaint (filed on August 4, 2004).

All claims against Defendants CAROL MIYASHIRO and JEFF MIYASHIRO were dismissed by notice filed pursuant to Haw. R. Civ. P. 41(a)(1)(A) on October 20, 2004.

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All claims against Defendants GLENN S. HARA and ROEHRIG, ROEHRIG, WILSON & HARA were dismissed with prejudice by stipulation and order entered on September 1, 2005.

All claims not specifically identified above are hereby dismissed without prejudiced.

Dated: Lihu'e, Hawai'i, JAN 11 2007.

[SEAL] George M. Masuoka
Judge of the Above-Entitled Court

APPROVED AS TO FORM:

DAVID J. GIERLACH
EUGENE J. ALBERTINI
Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

GEORGE MIYASHIRO, Plaintiff, vs. ROEHRIG, ROEHRIG, WILSON & HARA; STANLEY H. ROEHRIG, Attorney at Law, ALC; GLENN HARA, Attorney at Law; CAROL MIYASHIRO; JEFF MIYASHIRO; TITLE GUARANTY CO.; AND DOE DEFENDANTS 1-100, Defendants.	) CIVIL NO. 04-1-0211) [Other Civil Action])) CERTIFICATE OF SERVICE

Appendix H-5

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document will be duly served by HAND DELIVERY, UNITED STATES MAIL, postage prepaid, and/or FAC-SIMILE TRANSMISSION to the parties identified below at their last known address on the date herein indicated.

BRIAN J. DeLIMA, ESQ. (808) 969-6606
Crudele & De Lima
101 Aupuni Street
PH 1014-A, Hilo Lagoon Center
Hilo, Hawaii 96720

Attorney for Defendant
STANLEY ROEHRIG

KEITH K. HIRAOKA, ESQ. (808) 521-9648
Roeca Louie & Hiraoka
841 Bishop Street
Suite 900, Davies Pacific Center
Honolulu, Hawaii 96813

Attorney for Defendants
ROEHRIG ROEHRIG, WILSON & HARA
GLENN HARA

DIANA L. VAN DE CAR, ESQ. (808) 935-4853
101 Aupuni Street
Suite 238
Hilo, Hawaii 96720

Attorney for Defendant
TITLE GUARANTY ESCROW SERVICES, INC.

DATED: Honolulu, Hawaii, January 22, 2007.

/s/ David J. Gierlach
DAVID J. GIERLACH
Attorney for Plaintiff

DAVID J. GIERLACH 5041
500 Ala Moana Boulevard
Suite 330, 5 Waterfront Plaza
Honolulu, Hawaii 96813
Telephone: (808) 523-1332
Facsimile: (808) 526-2275
Email: gierlach33@aol.com

Attorney for Plaintiff

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

GEORGE MIYASHIRO, Plaintiff, vs. ROEHRIG, ROEHRIG, WILSON & HARA; STANLEY H. ROEHRIG, Attorney at Law, ALC; GLENN HARA, Attorney at Law; CAROL MIYASHIRO; JEFF MIYASHIRO; TITLE GUARANTY CO.; AND DOE DEFENDANTS 1-100, Defendants.	) CIVIL NO. 04-1-0211) [Other Civil Action]) PLAINTIFF-APPELLANT'S STATEMENT OF POINTS ON APPEAL; CERTIFICATE OF SERVICE) TRIAL: JANUARY 20, 2007

PLAINTIFF-APPELLANT'S STATEMENT STATEMENT OF POINTS ON APPEAL

Plaintiff-Appellant George Miyashiro respectfully submits the points he intends to raise on appeal pursuant to Rule 10(b)(4) of the *Hawaii Rules of Appellate Procedure*. Those points of error are as follows:

1. Whether the trial court erroneously granted summary judgment in favor of Defendants herein.

2. Whether the trial court erroneously failed to grant full *pro hac vice* status to Eugene J. Albertini.

3. Whether the trial court erred in failing to disqualify the law firm of De Lima & Crudele as counsel for Defendant Stanley Roehrig.

4. Whether the trial court's ruling on Defendant Roehrig's request for attorney fees and costs was in error.

DATED: Honolulu, Hawaii, January 29, 2007.

/s/ David J. Gierlach
DAVID J. GIERLACH
Attorney for Plaintiff-Appellant

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

GEORGE MIYASHIRO, Plaintiff, vs. ROEHRIG, ROEHRIG, WILSON & HARA; STANLEY H. ROEHRIG, Attorney at Law, ALC; GLENN HARA, Attorney at Law; CAROL MIYASHIRO; JEFF MIYASHIRO; TITLE GUARANTY CO.; AND DOE DEFENDANTS 1-100, Defendants.	) CIVIL NO. 04-1-0211) [Other Civil Action])) CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document will be duly served by HAND DELIVERY, UNITED STATES MAIL, postage prepaid, and/or FACSIMILE TRANSMISSION to the parties identified below at their last known address on the date herein indicated.

BRIAN J. DeLIMA, ESQ. (808) 969-6606
Crudele & De Lima
101 Aupuni Street
PH 1014-A, Hilo Lagoon Center
Hilo, Hawaii 96720

Attorney for Defendant
STANLEY ROEHRIG

KEITH K. HIRAOKA, ESQ. (808) 521-9648
Roeca Louie & Hiraoka
841 Bishop Street
Suite 900, Davies Pacific Center
Honolulu, Hawaii 96813

Attorney for Defendants
ROEHRIG ROEHRIG, WILSON & HARA
GLENN HARA

DIANA L. VA NDE CAR [sic], ESQ. (808) 935-4853
101 Aupuni Street
Suite 238
Hilo, Hawaii 96720

Attorney for Defendant
TITLE GUARANTY ESCROW SERVICES, INC.

DATED: Honolulu, Hawaii, January 29, 2007.

/s/ David J. Gierlach
DAVID J. GIERLACH
Attorney for Plaintiff